SJ Securities Sdn Bhd v Esmail bin Naziadin

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–228 OF 1998
CHIN FOOK YEN J
10 DECEMBER 1998

Securities *— Remisier — Withholding release letter — Action for recovery of debt owed by defendant/remisier to plaintiff/stockbroker — Defendant applied for injunction to order plaintiff to issue release letter — Whether judgment debt would deprive defendant from seeking employment elsewhere — Whether suspension of dealings would mean withholding release letter — Whether release letter should be issued*

The plaintiff was at all material times a private limited liability company duly licensed under the Securities Industry Act 1983 ('the Act') to carry on business as a stockbroker and was also listed as a member company of the Kuala Lumpur Stock Exchange ('KLSE'). The defendant was its remisier being duly licensed under the Act. According to the plaintiff, both of them entered an agreement providing the terms and conditions in respect of their respective role, which the defendant disputed and challenged. The plaintiff suffered a loss of more than RM6m in respect of contracts put through by the defendant for his clients who were unable to pay. Upon default of the defendant, the plaintiff instituted an action for recovery of the amount. The defendant, by way of summon in chambers (encl 8) applied for an injunction to order the plaintiff to issue the KLSE release letter. Counsel for the defendant submitted that by withholding the release letter, the plaintiff would deprive the defendant the opportunity of seeking employment elsewhere.

Held, granting the injunction:
Assuming the plaintiff being successful, the judgment would be a judgment for a debt and would not deprive the defendant of seeking employment elsewhere. The legal remedy available would be for the plaintiff to levy execution on the judgment, if it was not satisfied (see p 72E–F); *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45 followed.

[Bahasa Malaysia summary

Plaintif adalah pada masa yang material sebuah syarikat persendirian tanggungan berhad yang telah didaftarkan di bawah Akta Industri Sekuriti 1983 ('Akta tersebut') yang menjalankan perniagaan sebagai broker saham dan juga telah disenaraikan sebagai ahli syarikat Bursa Saham Kuala Lumpur ('BSKL'). Defendan adalah seorang remiser syarikat tersebut yang telah didaftarkan di bawah Akta tersebut. Menurut plaintif, kedua-dua mereka telah memasuki satu perjanjian yang memperuntukkan terma-terma dan syarat-syarat berkenaan dengan tugas mereka masing-masing, yang mana defendan telah

mempertikaikan dan mencabar perjanjian tersebut. Plaintif telah mengalami kerugian lebih daripada RM6 juta melalui kontrak-kontrak yang telah dikemukakan oleh defendan untuk pelanggan-pelanggannya yang tidak dapat membayar. Setelah defendan gagal membayar, plaintif telah memulakan satu tindakan bagi mendapatkan kembali jumlah tersebut. Defendan, melalui saman dalam kamar (lampiran 8) telah memohon satu injunksi untuk mengarahkan plaintif mengeluarkan surat lepasan BSKL. Peguam bagi defendan menyatakan dengan menahan surat lepasan tersebut, plaintif akan menghalang defendan dari berpeluang mencari perkerjaan di tempat lain.

Diputuskan, membenarkan permohonan:
Andainya plaintif berjaya, penghakiman yang akan diberi adalah satu penghakiman hutang dan bukan sesuatu yang akan menghalang defendan dari mencari perkerjaan di tepat lain. Remedi undang-undang yang ada bagi plaintif ialah dengan melevikan perlaksanaan ke atas penghakiman tersebut, jika ia tidak berpuas hati (lihat ms 72E–F).]

Notes

For cases on remisier, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 775–779.

Cases referred to

Gibb & Co v Malaysia Building Society Bhd [1982] 1 MLJ 271 (refd)
TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45 (folld)

Legislation referred to

Securities Industry Act 1983

Raymond Tan (*Sunny Liew* with him) (*Liew Hazalina*) for the plaintiff.
Sabapathy (*TH Lee* with him) (*Logan Sabapathy & Co*) for the defendant.

Chin Fook Yen J: The plaintiff was, at all material times, a private limited liability company duly licensed under the Securities Industry Act 1983 to carry on business as a stockbroker and was also listed as a member company of the Kuala Lumpur Stock Exchange ('KLSE'). The defendant was, at all material times, its remisier, being duly licensed under the Securities Industry Act 1983. According to plaintiff, both of them entered into an agreement dated 24 July 1997 providing the terms and conditions in respect of their respective role of which the defendant disputed and challenged. In the course of its business the plaintiff suffered a loss to the tune of more than RM6m in respect of contracts put through by the defendant for his clients who were unable to pay. The plaintiff, upon default of the defendant, instituted this action against the defendant for recovery of the amount.

In his defence, the defendant disputed less vehemently to the existence than he challenged the validity of the agreement for want of compliance with the Trading Rules as provided by KLSE. Secondly, as for the amount claimed, the defendant, besides disputing it, maintained that to date of filing of the defence no full accounts were rendered to him despite demands made. Lastly, as the main thrust of his defence, the defendant pointed out that upon default by the clients the plaintiff did not effect a force sale of the securities provided by the clients as required by the statutory regulations, but had instead entered into arrangements on its own with the clients, dealing in sham transactions of the securities. These married deals on the securities of which the defendant had no privity were below price, bringing about improper contra-loss of millions of ringgit. In short, the plaintiff was estopped from claiming against the defendant. Besides the defence as mentioned above, the defendant also counterclaimed against the plaintiff, inter alia, for defamation as well as for the issuance of the KLSE release letter which forms the subject matter of this judgment and I shall deal with it in a moment.

Subsequently, both parties made an application each: The plaintiff by a summons-in-chambers ('encl 6') applied to strike out portion of defence and counter-claim, mainly pertaining to the issue of defamation. At the hearing of encl 6, the parties reached an agreement so that the issue on defamation of the defendant to be deferred until after the claim of the plaintiff on the issue of breach of contract had been heard and decided and in the meantime the pleadings would remain as they were. I shared their view that the determination of the plaintiff's claim as it appeared, might help resolve the counter-claim for defamation. I accordingly made an order to that effect.

The defendant, however, applied also by way of summons-in-chambers ('encl 8') for an injunction to order the plaintiff to issue the KLSE release letter.The application under encl 8 then proceeded to hearing. After hearing submissions on both sides and considering the relevant provisions of the Rules and cases cited, I allowed the application and ordered the plaintiff to issue the KLSE release letter without prejudice to the plaintiff to present any objection to the KLSE. The plaintiff appealed. The reasons therefor appear below.

That the court has jurisdiction to grant interlocutory mandatory injunction, there can be no doubt about it. The jurisdiction of the court and the principles for granting such an injunction had been enunciated in the case of *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 (FC) at p 273 where His Lordship said:

> ... That statement of the law is correct as an interlocutory application for a mandatory injunction is a very exceptional form of relief (*Canadian Pacific Railway v Gaud* [1949] 2 KB 239 at p 249), but there is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the court has jurisdiction to so order. Fry LJ, said in *Bonner v Great Western Railway Company* (1883) 24 Ch D 1 at p 10): 'I have no doubt of the jurisdiction of the court to grant a mandatory injunction on interlocutory applications as well as the hearing.' The case

however must be 'unusually sharp and clear (*Shepherd v Sandham* [1971] Ch 340), and the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend inter alia upon considerations of hardship to the parties.

In the instant case, it was not disputed that all dealings of the defendant as a remisier with the plaintiff had been suspended. As such the defendant was unable to seek engagement with any other member company, because in order to do so there must be accompanied with the transfer application a KLSE release letter which the plaintiff was presently withholding, while its claim against the defendant pending hearing. It would be helpful to reproduce below the relevant Trading Rules and the Members' Circular No 3205 of 1984:

Rule 17: Dealer's Representatives

(1) (a) For the purpose of this rule, Dealer's Representative shall include remisiers and other office employees who are permitted to deal in securities; but exclude the holder of a Dealer's Representative licence who is a Corporate Nominee or a director of a Member Company.

(b) (i) No Member company shall employ a dealer's representative without the approval of the Committee.

(ii) ...

(iii) ...

(c) No person shall be registered as a dealer's representative to more than one (1) member company.

(d) The approval of such dealer's representative shall be conditional upon his being granted a licence under the Securities Industry Act.

...

(2) (a) ...

(b) The General Manager shall obtain any information he requires of all persons in respect of whom applications are submitted, including the views of any present and/or past employers.

(c) The General Manager shall circulate the names of the candidates to all Member companies allowing seven (7) days for objections.

(d) The General Manager shall submit to the Committee a summary of all the applications made and any objection from Member companies.

(e) The Committee shall consider the recommendations of the General Manager and will decide to approve or reject the applications.

(3) ...

(4) (a) Any Member company desirous of employing:

(i) a registered dealer's representative from another Member company; or

(b) Such applications shall be processed by the Exchange in accordance with the provisions in paragraph 2(b) to 2(e) of this Rule, both inclusive.

...

Members' Circular No 3205 of 1984

Application for Transfer of Dealer's Representatives

Members' attention is drawn to the attached procedures in respect of the captioned matter:

(1) To submit 'Form of Application to employ a Dealer's Representative from another Member firm/Member company' (a copy of which is enclosed herewith) before resignation.

(2) To remit the appropriate Transfer fee.

(3) To obtain a letter of release from the present Member firm/Member company.

(4) To enclose a photocopy of the applicant's Dealer's Representative's Licence.

Even though r 17 (for that matter the entire Rules) is silent on the issue of KLSE release letter, under the said members' circular it became a procedural requirement to 'obtain a letter of release from the present member company' in order to apply for transfer of dealer's representative including a remisier. In this case the defendant, counsel for the defendant submitted that by withholding the release letter, the plaintiff would deprive the defendant, the opportunity of seeking employment in breach of the defendant's constitutional rights to include the right to seek and be engaged in lawful and gainful employment. I did not intend to decide the issue at this stage of the proceedings, as to do so, I might prejudice the KLSE committee when considering the defendant's application. Whatever the rationale for the requirement, on my part, I see no justification in with-holding the release letter. Assuming for a moment the plaintiff being successful, it would be a judgment for a debt. Would that judgment entitle the plaintiff to withhold the release letter whereby to deprive the defendant the opportunity to seek employment elsewhere? Certainly not. The legal remedy available, would be for the plaintiff to levy execution on the judgment, if it was not satisfied. I was satisfied that such an injunction would be probably inevitable eventually. I found support for the view in the case of *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45 (FC). In this case, the plaintiff, a firm of architects sued for the balance of their professional fees. After pleadings had been closed, before hearing, the plaintiff terminated their services, leaving the project unfinished. In order to get another architect to take over the project, a letter of release from the plaintiff was imperative. This letter of release would give a licence or permission to someone to use the architect's drawings, a kind of copyright. Needless to say, the plaintiff refused unless, of course, their fees as claimed were paid. NH Chan J (now JCA) granted the defendant's interlocutory application for an interlocutory mandatory injunction. On appeal, the Federal Court affirmed the decision with this to say (at p 59): 'We do not think in the circumstances the court would allow the architect to withhold the letter of release. To do so would, in the words of Widgery FJ in *Blair v Osborne & Tomkins* [1971] 2 MLJ 78 mean "that the architect can hold the client to ransom.".' In the case cited, the architects besides claiming for

A sums of money, they had copyright in their drawings to protect. By analogy, it was a fortiori in the instant case, because the plaintiff herein did not have any right to protect by withholding the release letter other than the sum claimed. Having considered the matters aforesaid judicially, I preferred to exercise my discretion in favour of granting the order made.

B I would like to say a word about the KLSE release letter as mentioned in the members' circular. I completely failed to see the usefulness of it. For without it, the member/company present and /or past could still ventilate their grievances under r 17(2)(b), (c) and (d) to the General Manager, before the committee, being the governing body having the last say, would decide to approve or reject the application by virtue of r 17(2)(e). With the C deletion of the requirement, this application would not have come about. After all, by granting this injunction order, it still would not solve the problem. The merits of the application would still have to be considered by the court at first instance, ie the committee.

Injunction granted.

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Reported by Zahid Taib

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